

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-220331.2; B-220397 **DATE:** March 10, 1986  
B-220398  
**MATTER OF:** Exclusive Temporaries of Georgia,  
Inc.

**DIGEST:**

Where the evaluation scheme in an invitation for bids provides no reasonable assurance that award will result in the lowest cost to the government in terms of actual work performed, the invitation is defective per se and no bid can be evaluated properly.

Exclusive Temporaries of Georgia, Inc. (ETG) protests the termination of its contract for labor services awarded by the Internal Revenue Service (IRS) under invitation for bids (IFB) No. IRS-SE-85-14. ETG also protests the failure of the IRS to terminate two similar contracts for which ETG bid that were awarded to other companies under IFB Nos. IRS-SE-85-18 and IRS-SE-85-19. ETG contends that the IRS unfairly terminated its contract because the IFB allegedly was defective but did not terminate the other two contracts even though the IFBs contained the same defect.

We deny the protest under IFB No. IRS-SE-85-14 (B-220331.2) and sustain the protests under IFB Nos. IRS-SE-85-18 (B-220398) and IRS-SE-85-19 (B-220397).

IFB No. IRS-SE-85-14 invited bids to provide general and semi-skilled manual laborers. The pricing schedule provided separate line items for regular and overtime hours for full-time and part-time general laborers. Although the IFB stated that the agency's estimate for both full-time and part-time laborers was a total of 11,240 regular hours, bidders were instructed, for evaluation purposes, to base their bids on an estimate of 11,240 regular hours for each category of laborers (i.e., 11,240 hours full-time and 11,240 hours part-time). Similar separate line items were provided for the regular and overtime hours for the full-time and part-time semi-skilled laborers. Again, although the estimated total needs for both types of semi-skilled

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laborers was 3,560 hours, bidders were instructed to base their bids on an estimate of 3,560 hours for each of the semi-skilled categories.

The IFB required prices for all line items and stated that the basis for award would be the aggregate price for each service category (i.e., general and semi-skilled), determined by multiplying the unit price for each item in the category by the estimated quantity for the item and then totaling the items. The procurement was subject to the Service Contract Act of 1965, as amended, 41 U.S.C. §§ 351-358 (1982), and wage determinations from the Department of Labor were included in the IFB.

For the regular and overtime hours for the full-time general laborers, ETG bid \$6.27 and \$8.42, respectively; it bid \$5.28 and \$7.80, respectively for the part-time general laborers. In addition, ETG bid \$10.55 and \$14.34 for the regular and overtime hours of the full-time semi-skilled laborers and \$9.72 and \$14.34 for the part-time semi-skilled laborers. JBS, Inc., whose intent was to provide only part-time personnel, bid \$.10 and \$.15 for the regular and overtime hours of the full-time general laborers and \$7.75 and \$11.63 for the part-time general laborers. JBS also bid \$.10 and \$.15 for the regular and overtime hours for the full-time semi-skilled laborers and \$11.75 and \$17.63 for the part-time semi-skilled laborers.

After evaluation in accordance with the IFB, IRS determined that the bid of JBS for the general laborers was approximately \$40,000 below that of ETG, the second low bidder and the incumbent contractor. JBS' bid for the semi-skilled laborers was approximately \$30,000 below ETG's bid. This was so even though ETG's rates for part-time employees were considerably less than JBS' rates for the same categories; if ETG had bid \$.10 and \$.15 for the part-time employees its bid would have been lower than JBS' bid.

The contracting officer determined that JBS' bid was nonresponsive because JBS had not bid hourly rates for the full-time laborers at least equal to those required by the minimum wage determinations in the IFB. Award was then made to ETG and JBS protested to our Office. During the review of JBS' protest, IRS determined that JBS' bid was, in fact, responsive because the Service Contract Act does not establish what a bidder must bid but only the minimum

that a contractor must pay its employees.<sup>1/</sup> IRS decided, however, that the contract with ETG should be terminated and the procurement resolicited because the IFB resulted in bids that could not be evaluated on an equal basis. IRS determined that an award made under such circumstances did not give assurance that it would result in the lowest cost. We then dismissed JBS' protest; subsequently, ETG protested the termination of its contract.

As a general rule, our Office will not review an agency's decision to terminate a contract for the convenience of the government, since by law this is a matter of contract administration for consideration by a contract appeals board or a court of competent jurisdiction. An exception to this rule arises, however, when, as here, the termination was based on the agency's determination that the contract was improperly awarded to the terminated contractor. See Amarillo Aircraft Sales & Services, Inc., 63 Comp. Gen. 568 (1984), 84-2 CPD ¶ 269; Medical Gas & Respiratory Services, Inc., B-216632, Feb. 27, 1985, 85-1 CPD ¶ 246.

An IFB's evaluation scheme must comply with the statutory requirement for full and open competition. Thus, the evaluation scheme must be designed to give reasonable assurance that an award to the lowest evaluated bidder will result in the lowest cost to the government in terms of actual performance; if it does not, the IFB is defective per se and no bid can be evaluated properly. T. L. James & Co., B-219444, Sept. 17, 1985, 64 Comp. Gen. \_\_\_, 85-2 CPD ¶ 296; Southeastern Services, Inc., et al., 56 Comp. Gen. 668 (1977), 77-1 CPD ¶ 390. Furthermore, an evaluation method that incorporates more or less work than the agency expects to be needed does not obtain the benefits of full and open competition as required by the procurement statutes. Id.

In this case, the evaluation was based on total prices for an estimated 11,240 regular hours for full-time general employees plus 11,240 regular hours for part-time general employees, when the agency's actual requirement was for only an estimated total of 11,240 hours that could be met by using full-time or part-time employees, or both. A similar "double counting" occurred with respect to semi-skilled labor. Thus, the evaluation included 100 percent

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<sup>1/</sup> The fact that a firm bids a wage rate below the minimum Service Contract Act rate does not render the bid non-responsive. See NonPublic Educational Services, Inc., B-204008, July 30, 1981, 81-2 CPD ¶ 69.

more hours than the IRS anticipated would actually be needed. Moreover, by evaluating bids on the basis of total prices for supplying all the work with full-time employees plus all the work with part-time employees without having required bidders to designate what percentage of the work would actually be performed by each category, the agency could not reasonably determine which bid would actually result in the lowest cost to the government. This is well illustrated by the fact that the evaluation scheme permitted JBS to submit the low, responsive bid by skewing its prices so that they were low only in the full-time categories, for which it had no intention of supplying personnel.<sup>2/</sup> Moreover, an award to any of the other bidders, including ETG, who based their bids on the IRS' overstated needs could give no better assurance that it would result in the lowest cost to the government.

Therefore, IFB No. IRS-SE-85-14 and the competition based on it were defective, and the termination of ETG's contract to permit resolicitation under a revised solicitation was reasonable and proper. See Amarillo Aircraft Sales & Services, Inc., 63 Comp. Gen. 568, supra. ETG's protest on this matter is denied.

We find the same deficiencies in IFB No. IRS-SE-85-18 and IFB No. IRS-SE-85-19, which contained the same evaluation scheme as IFB No. IRS-SE-85-14. We are not persuaded by the argument of IRS that because no bidder bid nominal rates (as JBS did under IFB No. IRS-SE-85-14), all bids could and were evaluated on an equal basis with no prejudice to any bidder. For example, we note that the award under IFB No. IRS-SE-85-18 went to JBS because its price for full-time personnel and its aggregate bid were low. JBS's price for part-time personnel, however, was higher than that of ETG.

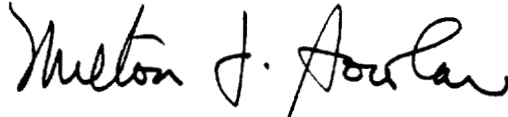
In our view, no award could be made under any of the three IFBs with any reasonable assurance that the bidders competed and were evaluated on a common basis and that the award would result in the lowest cost to the government. We therefore sustain ETG's protests with respect to the contracts awarded under IFB Nos. IRS-SE-85-18 and IRS-SE-85-19. These contracts were awarded for one year beginning on October 1, 1985, and are about 50 percent complete. We recommend that IRS recompile these requirements with a

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<sup>2/</sup> The agency states that JBS has admitted that its actual intent was to provide the required services by using only part-time personnel.

revised solicitation and then terminate the present contracts for the convenience of the government.

ETG's protest under IFB No. IRS-SE-85-14 is denied. Its protests under IFB Nos. IRS-SE-85-18 and IRS-SE-85-19 are sustained.

A handwritten signature in black ink, reading "Milton J. Aoulan". The signature is fluid and cursive, with the first name "Milton" and last name "Aoulan" being more prominent than the middle initial "J.".

Acting Comptroller General  
of the United States